BUSINESS AFFAIRS

The Next Wave of Film Financing: German Tax Shelter Funds
by Schuyler Moore

Prior Waves

Film financing is analogous to surfing. The goal is to keep your eye out for, and catch, the next big wave. Each ride is different and exhilarating, but sooner or later the ride ends when the wave breaks upon the shore. I have had the pleasure of "surfing" these financing waves for the last twenty year, during which time we have experienced:

- The U.S. public equity wave (witness Cannon and Carolco).
- The foreign bank wave (e.g., Credit Lyonnais).

- The Japanese financing wave (culminating in Matsushta acquiring Universal and Sony acquiring Columbia).
- The insurance-backed financing wave, which crashed eighteen months ago.
- The German public equity wave, which crashed six months ago.

The Next Wave

So what's next? I had initially thought the next wave would be the Italian or Spanish public stock markets, but they have petered out. Instead, the next wave is clearly building again in Germany, which would seem to defy gravity (they must have way too much money in Germany), but this time the funding is coming from the German tax shelter funds. This wave is being driven by a number of factors, including the following:

- Germany has closed down most other tax shelters (such as for ships), so films remain one of the last viable tax shelters.
- The impetus behind all film financing waves is that the film industry is sexy, and investors would rather have a prospectus on their coffee table that has sexy pictures from films than pictures of widgets.
- Investors believe it is better to invest "directly" in films than in once high-flying publicly traded German film companies.

Tax Benefits

The tax benefits available in Germany are astonishing. German tax law permits the immediate deduction of the cost of creating "intangible" assets, including films. Thus, investors are able to immediately write off the entire cost of producing a film. This is in stark contrast to almost all other tax systems, which require the cost of creating a film to be amortized either over a number of years or as a percentage of revenues received (in order to match deductions and income).

Under the German tax system, investors get deductions now and income later, which is the stuff tax dreams are made of. With tax rates in excess of 50%, the up-front deduction is a substantial benefit, which is magnified if the investment is leveraged with debt. For example, if the debt/equity ratio is 1:1, the investor immediately gets back more in tax savings than the amount of the investor's actual cash investment (although the investor will be liable for repayment of the debt later on).

Most importantly, the films do not have to be produced at all in Germany. Most countries that have film tax shelters require production in the home country, and the tax shelters serve as an indirect, but intended, subsidy for local production. In contrast, Germany's system results in an unintentional subsidy for worldwide production. This fact has not escaped the German government's attention, and over time, Germany has passed increasingly restrictive requirements on German tax shelters. These restrictions have changed the business model (discussed below), but they have not - by any means - changed the fundamental benefits of film tax shelters outlined above.

Structures

German tax funds come in two basic flavors: (a) net-benefit funds and (b) equity funds. Historically, most funds have been net-benefit funds, which are typically structured similar to the classic sale-leaseback model. A film company sells underlying film rights to a German fund, which finances the film's production budget by borrowing funds that are directly or indirectly lent by, or guaranteed by, the film company. The German fund then licenses the film rights back to the film company (or its affiliate) for essentially fixed payments over time. The film company defeases its obligation to pay these fixed payments by depositing a fixed amount with a bank up front. The amount deposited with the bank is less than the total investment by the German fund, so the net result is that the film company gets to pocket the net benefit. In most transactions, when the dust settles (net of commissions, transaction costs, etc.), the film company pockets about 10% of the budget of the film. In some cases, the film company also owes some theoretical back-end participation to the German fund, but these are typically structured in such a way as to rarely kick in.

Since the bottom line with a net-benefit fund is that the film company pockets about 10% of the budget, and this is often paid after production, the film company must have the financing for the budget itself or from another source (such as a bank loan). In other words, net-benefit funds do not really provide the funds to fund the budget itself. On the other hand, film companies do not owe much, if anything, on the back end to net-benefit funds. Based on this combination of factors, studios typically prefer net-benefit funds.

In contrast to net-benefit funds, German equity funds actually cash flow all or a substantial part of the film's budget and take a true equity position in the success or failure of the film. While these funds absolutely care about the economics of the deal, the German tax benefits take some of the edge out of the negotiations. Thus, these equity funds can typically accept more risk (and the possibility for a lower return) than other equity investors that do not have the German tax benefits.

German equity funds are not willing to be completely at risk. Typically, they insist on minimum guaranties of at least 50% of the budget, with estimates from a reputable sales agent of sales in excess of the total budget. For marketing purposes, the equity funds also like to have a guarantee of repayment of at least a substantial part of the investment, even if this guarantee is payable after a number of years without interest. Also, the fund managers definitely want the funds to earn a decent return; their hope is to raise the next fund and the next . . . and this won't happen if the first fund is a bust.

Many independent film companies relish German equity funds because they can cash flow production and demand less in return than a normal equity investor. Life doesn't get better (unless you think the film will be a blockbuster, which would result in the payment of a share of profits to the equity fund, and you have a cheaper alternative to fund production).

As a result of increasing restrictions under German law, including the requirement that investors be at-risk, net benefit funds are waning and equity funds are gaining favor. What was once a nice financing structure for generating approximately 10% of the budget has thus blossomed into the next full-fledged equity wave of film financing.

German Requirements

All German tax shelter funds, including net-benefit funds and equity funds, must meet a number of structural requirements to obtain German tax benefits, but the two most important ones are as follows:

- The German fund must own the copyright to the picture. While this causes film companies heartburn, it is usually not a significant concern. First, all distribution rights can be licensed back to the film company (or its affiliate), and the value of a film lies in its distribution rights, not in owning a naked copyright. Further, the copyright can be reacquired down the road through a repurchase option granted up front.
- The German fund must be the "producer" of the film. As such, it is supposed to have substantial input (both creative and otherwise) as to production of the film. In practice, however, most of this authority is delegated one way or the other back to the film company or its affiliates.

U.S. Tax Issues

For U.S. film companies, an important consideration is the U.S. tax characterization of the transactions. Issues that need to be addressed include the following:

- Will U.S. or German withholding be imposed on any of the payments?
- Will the arrangement with an equity fund be treated as a deemed partnership between the film company and the equity fund, possibly resulting in the equity fund being taxed in the U.S. (and the film company being liable for this tax)?

These issues can usually be dealt with in advance by carefully structuring the transaction, but it is better to address these issues up front than on audit.

Conclusion

Surf's up! It is good to know that just as the last film financing wave (the German stock market) is receding, the next wave is coming in, and this rhythm will remain for so long as the film industry needs money and sex sells.

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Hein & Co.). He is also an adjunct professor at the UCLA School of Law, teaching Entertainment Law. His article about German investment in Hollywood movie making appeared in the July 2000 issue of the Entertainment Law Reporter (ELR 22:2:4)[ELR 23:2:4]

INTERNATIONAL DEVELOPMENTS

European Union adopts Copyright Directive harmonizing protection among EU members; directive also protects digital rights, anti-circumvention measures, and rights-management information

The European Union has adopted a new Copyright Directive requiring its members to provide harmonious (though not perfectly identical) protection for "rightholders," that is, for authors, performers, record companies, film producers and broadcasters. The new directive contains provisions concerning the rights of reproduction, communication to the public (what in the United States would be called "public performance"), and distribution - provisions that are applicable to all forms of media.

The Directive, however, traces its origins to developments in digital technologies, including the Internet. As a result, the most significant provisions of the Directive are those designed to assure continued protection for authors and others as the reproduction, performance and distribution of their works evolves from older analog means to newer digital ones.

The EU has been working on copyright harmonization for more than a decade. Its latest Directive is the sixth in a series that began in 1991 with a directive on legal protection for computer programs.

That was followed with a 1992 directive on rental and lending rights, a directive in 1993 on satellite broadcasting and cable retransmission, another 1993 directive on the term of copyright protection, and a 1996 directive on the protection of databases.

(In 2000, the EU adopted a directive on electronic commerce; but that directive addresses defamation, misleading advertising and trademark issues, rather than copyright issues.)

Work on the new Copyright Directive began in 1996, in response to two WIPO treaties adopted that year: the WIPO Copyright Treaty, and the WIPO Performances and Phonograms Treaty. Those are the treaties that required the United States to enact the "WIPO Implementation" provisions of the Digital Millennium Copyright Act ("DMCA") (ELR 20:6:4). In many of their details, the EU Copyright Directive and the DMCA are quite similar; but they are not identical.

The Copyright Directive is less complex, and thus more easily understood, than the DMCA. The Copyright Directive also contains bolder assertions (than does the DMCA) that the rights of copyright owners must be protected in digital media. On the other hand, the Copyright Directive authorizes EU members to enact national laws that give users greater rights to use copyrighted works than does the DMCA, pursuant to exceptions and limitations to exclusive rights, subject to the right of copyright owners to receive "fair compensation" for legally-permitted uses (what in the United States would be called statutory or compulsory license fees).

Subject to a number of exceptions and limitations, the Copyright Directive requires EU members:

- to give authors (and others) the exclusive right to authorize or prohibit the temporary or permanent reproduction of their works, performances, recordings, films and broadcasts;

- to give authors (and others) the exclusive right to communicate their works (performances, etc.) to the public by wire or wireless means, including the Internet; and

- to give authors (but not performers, record companies, film producers or broadcasters) the exclusive right to authorize or prohibit the distribution of their works to the public.

As in the DCMA, the Copyright Directive's exceptions and limitations take more space than the exclusive rights. They include a mandatory exemption to the reproduction right for "transient and incidental" reproductions that are an essential part of a network transmission by "an intermediary" (such as an Internet Service Provider); or to enable a "lawful use" so long as the reproduction has no "independent economic significance."

The Directive also permits (though does not require) EU members to provide exemptions to the reproduction and public communication rights for a number of specifically described purposes, including reproductions by people (not corporations) for non-commercial "private" uses, on condition that the rightholder receives "fair compensation."

Two sections of the Directive directly respond to the two WIPO treaties. One is a section that requires EU members to "provide adequate legal protection against the circumvention of any technological measures" - such as encryption, scrambling, and copy control mechanisms - designed to prevent unauthorized uses of works (performances, etc.). Since the law may permit certain uses, like private copying, the anti-circumvention provision of the Directive also permits

EU members to "take appropriate measures to ensure that rightholders make [those uses] available. . . ." The other is a section that requires EU members to provide legal protection against removing or altering rights-management information.

EU members have 18 months - until the summer of 2002 - to enact necessary legislation implementing the Directive.

Editor's note: Two important issues in connection with the potential liability of Internet and Online Service Providers are dealt with in two of the Directive's "Recitals," rather than in its more formal "Articles."

One Recital provides that "The mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Directive." This appears to mean that if a website operator communicates a performance, recording or film to the public, without being licensed to do so, the website's ISP or OSP will not be liable for violating the exclusive communication right, even though the website operator itself will be. It is thus possible that had this Directive been implemented in Germany at the time the activities litigated in Hit Bit Software GmbH v. AOL Bertelsmann Online GmbH (ELR 22:12:7) took place, AOL would not have been found liable for the infringing activities of its users.

A second Recital of significance to ISPs and OSPs provides "In the digital environment . . . , the services of intermediaries may increasingly be used by third parties for infringing activities. In many cases such intermediaries are best placed to bring such infringing activities to an end. Therefore . . . , rightholders should have the possibility of applying for an injunction against an intermediary who carries a third party's infringement . . . in a network." From this, it appears that even if AOL would not have been liable for infringement in the Hit Bit Software case, Hit Bit would have been able to get an injunction against AOL requiring it to block access to the infringing midi files that were posted in its forum.

EU Directive on Copyright in the Information Society (April 9, 2001), available at www.eurorights.org/eudmca/CopyrightDirective.html [ELR 23:2:6]

WASHINGTON MONITOR

Broadcast of edited version of Eminem's "The Real Slim Shady" apparently violated federal indecency laws, FCC Enforcement Bureau concludes

A Citadel Broadcasting radio station in Pueblo, Colorado, broadcast "The Real Slim Shady" more than 400 times during the spring and summer of 2000. The Eminem recording turned out to be an expensive piece of programming. The FCC Enforcement Bureau has determined that its lyrics are "indecent," and thus Citadel apparently violated federal laws by broadcasting it between 6:00 a.m. and 10:00 p.m. As a result, the Bureau has proposed to fine Citadel $7,000.

To its credit, Citadel realized in advance of its broadcasts that "The Real Slim Shady" might be considered "indecent" by the FCC, so the station actually broadcast a "radio edit" version that omitted some of those lyrics through the use of a muting device or overdubbed sound effect. Unfortunately, the Enforcement Bureau has decided that even the edited version is indecent.

In its Notice of Apparent Liability for Forfeiture, the Bureau concluded that "The edited version of the song contains unmistakable offensive sexual references. In this regard, portions of the lyrics contain sexual references in conjunction with sexual expletives that appear intended to pander and shock." The Bureau acknowledged that Citadel attempted to edit the recording to make it suitable for broadcast. Nevertheless, the Bureau added that it "believe[s] that [Citadel] failed to purge a number of indecent references."

The Bureau therefore concluded that Citadel "willfully" broadcast indecent language and thus is apparently "liable for a forfeiture penalty."

By FCC rule, Citadel must pay the fine or seek its reduction or cancellation.

In the Matter of Citadel Broadcasting Company, Licensee of Station KKMG(FM), Notice of Apparent Liability for Forfeiture, FCC No. EB-00-IH-0228 (June 1, 2001), available at www.fcc.gov/eb/Orders/2001/da011334.doc [ELR 23:2:8]

FCC Enforcement Bureau denies Infinity Broadcasting's petition for reconsideration of $2,000 penalty for broadcasting indecent recording "You Suck"; though DJ and station manager believe that edited version was broadcast, Bureau accepts complaining listener's assertion that she heard broadcast of unedited CD version

On March 28, 1997, at 9:10 p.m., KROQ-FM broadcast "You Suck" by the group Consolidated. The broadcast so offended one listener - though apparently only one - that she filed an "indecency" complaint with the FCC.

The CD version of the recording's lyrics contain such non-lyrical words as "pubic," "dick," "pussy" and "clit." And in due course, the FCC Enforcement Bureau fined the station's owner, Infinity Broadcasting, $2,000 for having violated federal laws banning the broadcast of indecent language between 6:00 a.m. and 10:00 p.m.

A KROQ announcer "thought the unedited version was not acceptable for broadcast," so the station had made a second version of "You Suck" that did not contain the words "pubic," "dick," "pussy" or "clit," or any other indecent material.

When informed that it apparently was liable for broadcasting indecent language, Infinity submitted an affidavit from the announcer who played "You Suck." He said that he "did not recall" which version of the recording he aired. Unfortunately, the station does not keep copies of its broadcasts, so Infinity couldn't prove it had broadcast the edited version. But in the announcer's opinion, and in the opinion of the station's manager, it must have been the edited version, because "numerous complaints would have been forthcoming if the unedited version had been played," while the only complaint it actually received was from the same woman who complained to the FCC.

The FCC then asked the complaining listener whether she had heard the words "pubic," "dick," "pussy" and "clit," and she said she had. "We believe," the Bureau concluded, "that the complainant's recollection that she heard those words provides sufficient probative evidence to conclude that the unedited version of the song was broadcast, particularly in the absence of any evidence to the contrary."

In its petition for reconsideration, Infinity argued that the Bureau had deviated from prior FCC policy by not requiring the complaining listener to supply a tape, transcript of significant excerpt of the broadcast itself. The listener had provided the FCC with a CD of the unedited version "You Suck," not a recording or transcript of KROQ's actual broadcast.

The Bureau, however, rejected Infinity's argument. It concluded that the CD "constituted a 'significant excerpt' of the programming that she alleged to be indecent, albeit not one that she transcribed herself. This, along with the date and time of the broadcast and the call sign of the station in question, provided a sufficient basis for identifying a violation of the indecency prohibition." In denying Infinity's petition for reconsideration, the Bureau concluded by noting that "In any event . . . our practice that complainants provide a tape, transcript or significant excerpt is not a requirement, but a general practice used by the Commission to assist in the evaluation of indecency complaints."

In the Matter of Infinity Broadcasting Corporation of Los Angeles, Licensee of Station KROQ-FM, Pasadena, California, Memorandum Opinion and Order, FCC No.

97050319 (March 22, 2001), available at www.fcc.gov/eb/Orders/2001/da01720.doc [ELR 23:2:8]

FCC issues Policy Statement on broadcast indecency

The FCC has issued a Policy Statement "to provide guidance to broadcast licensees regarding compliance with the Commission's indecency regulations."

The new Policy Statement finally fulfills the FCC's obligations under a 1994 agreement to "publish industry guidance relating to its caselaw interpreting 18 U.S.C. § 1464 [the federal statute banning broadcasts of indecent language] and the FCC's enforcement policies with respect to broadcast indecency." The 1994 agreement settled an enforcement action against Evergreen Media, a station owner that had been accused of violating federal indecency law. Though that 1994 agreement required the FCC to publish guidance within nine months, it has taken the FCC almost seven years to do so.

The amount of guidance the Policy Statement will provide to broadcasters as a practical matter is open to debate. The 19-page document summarizes the FCC's regulations and explains its "analytical approach to reviewing allegedly indecent material." The FCC intended the Statement to "provide[] a framework by which broadcast licensees can assess the legality of airing potentially indecent material."

But that framework consists, for the most part, of "numerous examples" of broadcasts that in prior cases have been found to be indecent or not indecent. Apparently, the hope is that broadcasters - in the person of programming executives and disk jockeys - will be able to assess the decency or indecency of newly-released recordings by comparing their lyrics to the lyrics of older recordings that already have, or have not, been deemed "indecent."

The Policy Statement does not appear to adopt any new FCC policy. Instead, like a law review article or short treatise, it organizes, summarizes and recaps previously published FCC rulings and regulations.

However, for those who haven't followed the prior cases closely, the Statement reveals the extent to which radio listeners and television viewers have been able to use existing law to trigger serious government inquiry into the propriety of broadcasts that only the hypersensitive would find offensive. For example, the Statement shows that the FCC has investigated indecency complaints about broadcasts of "Schindler's List," the "Oprah Winfrey Show," and the National

Public Radio program "All Things Considered" - none of which was in fact found to be indecent.

Perhaps for this reason, FCC Commissioner Harold Furchtgott-Roth issued a separated statement of his own, in which he said that FCC "action to enforce the indecency guidelines would set the stage for a new constitutional challenge regarding our authority to regulate content." He acknowledged that Red Lion v. FCC and FCC v. Pacifica "have not yet been overruled. Nevertheless," he added, "their continuing validity is highly doubtful from both an empirical and jurisprudential point of view." He explained that originally, regulation of broadcast content was justified on the grounds that broadcasting was the dominant medium. Now though, he said, "Technology, especially digital communications, has advanced to the point where broadcast deregulation is not only warranted, but long overdue. In my view, the bases for challenging broadcast indecency has been well laid, and the issue is ripe for court review."

On the other hand, the Policy Statement also quotes lyrics the FCC has found to be indecent, and in doing so, the Statement reveals - for those who aren't familiar with rap lyrics - just why a fuss is being made about them.

Perhaps for this reason, FCC Commissioner Susan Ness issued a separate statement of her own in which she said, "Understandably, the public is outraged by the increasingly coarse content aired on radio and television at all hours of the day, including times when children are likely to be listening or watching." Commissioner Ness is sensitive to the First Amendment problems presented by government regulation of broadcast content. "However," she added, "it is entirely within the power of broadcasters to address it - and to do so without government intrusion. .

. . It is time for broadcasters to consider reinstating a voluntary code of conduct. I encourage broadcasters, the Bush Administration, and Congress swiftly to resolve any antitrust impediments to such action and move ahead."

In a third - and dissenting - separate statement, Commissioner Gloria Tristani took her colleagues to task for adopting the Policy Statement in the first place. She complained that "this Policy Statement will likely become . . . a 'how-to' manual for those licensees who wish to tread the line drawn by our cases. . . . [T]he Statement is nothing more than a remedy in search of a problem. It would better serve the public if the FCC got serious about enforcing the broadcast indecency standards."

In the Matter of Industry Guidance On the Commission's Case Law Interpreting 18 U.S.C. § 1464 *and Enforcement Policies Regarding Broadcast Indecency*, Policy Statement, FCC No. EB-00-IH-0089 (April 6, 2002), available at http://www.fcc.gov/Bureaus/Enforcement/Orders/2001/fcc01090.pdf [ELR 23:2:9]

American Opera Musical Theatre Company committed unfair labor practice by withdrawing recognition of Associated Musicians of Greater New York, after agreeing to bargain with it, NLRB rules

The American Opera Musical Theatre Company legally recognized the Associated Musicians of Greater New York as the collective bargaining representative of the Company's musicians, even though the Union never demonstrated that it represented a majority of those musicians and never formally asked the Company to recognize it, and indeed, even though the Company merely agreed to (and did) bargain with the Union without stating that it recognized it. The NLRB has so held; and as a result, it has affirmed an Administrative Law Judge's decision that the Company committed an unfair labor practice by later withdrawing recognition of the Union.

The American Opera Musical Theatre Company operates a small chamber opera company. Formed in 1995, its purpose is "to give musicians experience in a field where it is difficult to obtain professional experience." Consistent with that purpose, the Company "usually hired . . . musicians from local music schools." The musicians it hired were not amateurs, however. At least some of them were members of the Associated Musicians of Greater New York, which is Local 802 of the American Federation of Musicians.

Though at least some of the Company's musicians were AFM members, the Company was not a signatory to the Union's collective bargaining agreement, as of October 31, 1998. That day is significant, because on that date, the Union threatened to strike a scheduled November 1st performance, unless the Company agreed to negotiate a collective bargaining agreement once the performance was over.

The Company agreed to negotiate, but those negotiations did not lead to an agreement. The Union made financial demands the Company said it could not afford, and other demands the Company said it was unwilling to agree to (giving certain musicians first-refusal employment rights for future performances). As a result, the Company's lawyer sent the Union a letter that said: "Although we do not consider [the Company's] fax to [the Union] on November 1, 1998 to have been a conferral of recognition upon Local 802 of the American Federation of Musicians, to the extent it may be deemed such a conferral, it is hereby withdrawn on the grounds that American Opera Musical Theatre Company, Inc. currently employs no musicians or other employees in view of the fact that Sunday's opera production is over."

That is what triggered the Union's unfair labor practice charge. Administrative Law Judge Joel Biblowitz ruled in favor of the Union, and a three-member panel of the NLRB has affirmed that ruling by adopting Judge Biblowitz's opinion and order.

Judge Biblowitz ruled that the Company had recognized the Union, because "A commitment to enter into negotiations with the union is also an implicit recognition of the union." This meant that the Company's subsequent withdrawal of recognition was illegal, because "Once the original commitment to bargain is made, the employer cannot unilaterally withdraw its recognition and to do so is a violation of the [National Labor Relations] Act."

Though the Union never demonstrated that it represented a majority of the Company's musicians, this was no defense, the judge ruled, because a union does not have to "demonstrate its majority status before an employer can recognize it. Rather, an employer can recognize a union without such a demonstration, but risks . . . liability for recognizing a union supported by a minority of the unit employees."

The NLRB therefore ordered the Company to bargain collectively with the Union.

The Company was represented by Neil Capobianco, Vedder Price Kaufman & Kammholz. The Union was represented by Harvey Mars, Liebowitz & Mars. And the NLRB General Counsel was represented by Mindy Lando.

American Opera Musical Theatre Company and Associated Musicians of Greater New York, Local 802, AFM, NLRB Case 2-CA-32154, 332 NLRB No. 173 (2001), available at www.nlrb.gov/slip332.html [ELR 23:2:10]

RECENT CASES

USA Cable did not effectively exercise its right of first refusal to "WWF Raw" and other programs, because USA did not match two material terms of Viacom's offer, Delaware Supreme Court holds

World Wrestling Federation programs like "WWF Raw" are no longer carried by USA Cable, because USA failed to effectively exercise its right of first refusal. Though USA purported to match a competing offer the WWF received from Viacom, USA failed to match several terms of the Viacom offer, including two material terms, the Delaware Supreme Court has held.

WWF programs have been shown on USA Cable since 1983, pursuant to a long string of contracts. The most recent of those contracts, entered into in 1998, prohibited the WWF from entering into an agreement with any other company "with respect to any or all of [four programs] without first giving USA a right of first refusal, exercisable within ten (10) business days following receipt by USA of written notice detailing the terms of the third party offer(s) . . . which [the WWF] intends to accept."

In April 2000, the WWF received an offer from Viacom, portions of which concerned "WWF Raw" and the other programs that were the subject of USA's first refusal rights. Other portions of Viacom's offer, however, had nothing to do with those programs; instead, they dealt with such things as the XFL, theme park events and movies.

The Delaware Chancery Court held that USA was not required to match Viacom's offer concerning the XFL, theme parks, movies and the like; USA merely had to match Viacom's offer with respect to the four programs for which USA had a first refusal right. In an opinion by Chief Justice E. Norman Veasey, the Delaware Supreme Court has agreed. The Chief Justice ruled that the Chancery Court was "clearly correct" in deciding that the "with respect to" language of the first refusal clause limited the scope of USA's rights and obligations; and thus USA was not required to match Viacom's offer for things other than the four programs in order to exercise its first refusal rights.

Viacom's offer for "WWF Raw" and the other three programs contained several terms, four of which

USA purported to match, but did not, the WWF argued. The Chancery Court agreed with the WWF as to all four; the Supreme Court agreed only with respect to two. But since the Supreme Court agreed that all four terms were material and that USA did not match Viacom's offer with respect to two of them, that was enough for the Supreme Court to affirm the Chancery Court's decision in favor of the WWF and against USA.

The Supreme Court ruled that USA matched Viacom's offer with respect to the territory in which the programs would be carried, even though Viacom's offer included Canada and the Caribbean, and USA's did not. Chief Justice Veasey held that USA was not obligated to match Viacom's offer to carry the programs in Canada and the Caribbean, because USA's original and first refusal rights never included those territories. Thus, since the WWF could have granted Viacom rights to those territories without violating USA's rights, USA did not have to match Viacom's offer to carry the programs in those territories, in order to validly exercise its first refusal rights.

The Supreme Court also ruled that USA had matched Viacom's offer to commit that there would be "no regularly scheduled preemptions" of WWF programs. USA's written offer matched Viacom's offer on this issue word-for-word. The Chancery Court had relied on trial testimony to find that USA did not intend to honor its "no preemption" commitment. But the Supreme Court held that "objective manifestation must control, absent some extraordinary circumstances (such as a clear and written repudiation), that are not present on this record."

On the other hand, the Supreme Court agreed that USA had not matched Viacom's offer with respect to the selection of a forum for the resolution of disputes. Viacom had offered to give New York courts exclusive jurisdiction to hear disputes, while USA's offer gave New York courts only non-exclusive jurisdiction. The Supreme Court concluded that this was a material term, and that USA failed to match Viacom's offer.

Finally, the Supreme Court held that USA had not matched Viacom's offer to cross-promote WWF programs in media other than cable television, such as by broadcast television, radio and billboards. Chief Justice Veasey acknowledged that USA does not own radio stations or billboards. But the Chief Justice noted that cross-promotion was important to the WWF. "Although USA may not have had the internal capability to provide the cross-promotion required to match the Viacom proposal," the Chief Justice explained, "it had the capability to contract with others to do so."

USA Cable was represented by David C. McBride, Young Conaway Stargatt & Taylor, Wilmington; and by Herbert M. Wachtell, Wachtell Lipton Rosen & Katz, New York City. The WWF was represented by Robert K. Payson, Potter Anderson & Corroon, Wilmington; and by Jerry S. McDevitt, Kirkpatrick & Lockhart, Pittsburgh. Viacom was represented by A. Gilchrist Sparks III, Morris Nichols Arsht & Tunnell, Wilmington; and by Richard B. Kendall, Irell & Manella, Los Angeles.

USA Cable v. World Wrestling Federation Entertainment, 766 A.2d 462, 2000 Del.LEXIS 397 (Del. 2000)[ELR 23:2:11]

Order requiring Trademark Office to cancel manager Larry Marshak's registration of "The Drifters" is affirmed on appeal, as is ruling that Marshak infringed common law rights of manager Faye Treadwell

It looks as though Larry Marshak has reached the end of the line insofar as his management of groups named "The Drifters" is concerned. Marshak has aggressively, and successfully, asserted his exclusive right to use "The Drifters" name for years, in trademark suits against former group members who had struck out on their own (ELR 3:1:1, 9:10:10). But the longtime Drifters manager finally took on more than he could handle, when he sued Faye Treadwell, the widow of The Drifters original manager, George Treadwell, and George's successor as a Drifters manager in her own right.

Marshak and Treadwell actually managed two separate groups - Marshak, a group that performed in the United States, and Treadwell, a group that performed in Europe. Treadwell, however, was the successor to the original Drifters, and as such, she was the one who collected royalties from continuing U.S. sales of recordings made by the group, including such huge hits as "There Goes My Baby," "Save the Last Dance for Me," "Up on the Roof" and "Under the Boardwalk."

In an effort to shore up his own claim to "The Drifters" trademark, Marshak had it registered with the U.S. Trademark Office back in 1976. When, however, he sued Treadwell for trademark infringement in 1995, she responded by countersuing him, claiming that his trademark registration had been fraudulently obtained and that Marshak had infringed her common law trademark rights in the name.

Following trial, a jury agreed with Treadwell that Marshak's federal registration had been obtained through a fraud on the Trademark Office, because affidavits submitted in support of the application said that to the best of their knowledge and belief, no other person or company had the right to use "The Drifters" mark, even though the performers who signed those affidavits had once worked for Treadwell and knew that she had the right to use the name. Also, federal District Judge Nicholas Politan agreed with Treadwell that Marshak's use of "The Drifters" had infringed her common law rights. (ELR 21:9:11)

In an opinion by Judge Samuel Alito, the Court of Appeals has affirmed Treadwell's victory, on both issues.

Judge Alito rejected Marshak's arguments that Treadwell's "fraud on the Trademark Office" claim was barred by the statute of limitations and estoppel, as well as his argument that the evidence did not support Treadwell's fraud claim.

Treadwell also argued that the jury had been improperly instructed that it could find fraud, if it found that Marshak knew "or should have known" that Treadwell had a superior right to "The Drifters" name. Judge Alito agreed that this jury instruction "was not entirely correct." To succeed, Treadwell actually had to prove that Marshak "actually knew or believed" - not merely that "he should have known" - that Treadwell had a right to the mark. Nevertheless, the judge ruled that "the error was harmless."

Judge Alito explained that the incorrect jury instruction "could have affected the verdict only if a properly instructed jury would have found that [Marshak] had an actual but unreasonable belief that no one else had a right to use 'The Drifters' name." Based on the evidence presented to the jury, the judge said the appellate court was "convinced that a properly instructed jury would not have made such a finding."

Marshak attacked the judgment that he had infringed Treadwell's common law rights by arguing that she had abandoned whatever rights she had, by taking her group to Europe and not performing in the United States. District Judge Politan had rejected this argument, because Treadwell still receives royalties from the sale of Drifters recordings in the U.S. And the Court of Appeals "concur[red] with this reasoning . . . ."

In order to succeed with his abandonment defense, Marshak would have had to "prove non-use, i.e., that the classic recordings of 'The Drifters' were not played and that the resulting royalties were not paid." Marshak didn't even claim, let alone prove, this. Moreover, Marshak didn't prove that Treadwell had an actual intent to abandon The Drifters mark, Judge Alito explained.

Marshak was represented by Stephen B. Judlowe, Hopgood Calimafde Kalil & Judlowe, New York. Treadwell was represented by James P. Flynn, Epstein Becker & Green, Newark.

Marshak v. Treadwell, 240 F.3d 184, 2001 U.S.App.LEXIS 2211 (3rd Cir. 2001)[ELR 23:2:12]

ASCAP lawyers do not represent ASCAP members, and thus are not disqualified from representing ASCAP in dispute with television composer Richard Lewis Warren, federal court rules; court also enjoins Warren from filing further lawsuits against ASCAP

Back in 1983, television composer Richard Lewis Warren defected from BMI to become an ASCAP member. ASCAP, no doubt, has regretted it ever since, because Warren has constantly complained that: ASCAP has failed to pay him for performances of compositions transferred to it from BMI; has failed to give him "feature" performance credits for cues he composed for "Dallas" and "Remington Steel"; has failed to pay him adequately for foreign performances; and has denied him access to ASCAP membership lists and financial records.

Warren has voiced these complaints in a Protest before the ASCAP Board of Review and in several lawsuits filed in California. Though ASCAP has prevailed in all of those matters, ASCAP finally sought a court order of its own, in an effort to bring Warren's complaints to an end.

ASCAP has been successful. Federal District Judge William C. Conner - the "rate court" judge who presides over the ASCAP Consent Decree - has ruled in ASCAP's favor on five separate issues, and in Warren's favor on none.

The most significant of these issues - to others, if not to Warren and ASCAP personally - was Warren's contention that ASCAP's lawyers could not represent it before the Board of Review or his appeal from its decision, because of their alleged conflict of interest. The Board decided that ASCAP owed Warren no additional royalties, a decision that Warren was entitled to appeal to the AAA. Warren, however, refused to pursue that appeal - not because he was satisfied with the Board's decision (he wasn't), but because he objected that the lawyers who were representing ASCAP were his own lawyers too, and thus they should be disqualified.

There is in fact some case authority for the proposition that each member of an unincorporated association is a client of the association's lawyer. But Judge Conner held that "in recent years" the law has changed so that the "mere status of being a member of an unincorporated association no longer makes one a client of the association's attorney." Instead, several factors are now considered on a case-by-case basis. And that analysis led the judge to conclude that "no attorney-client relationship existed between ASCAP's attorneys and Warren." Judge Conner therefore ruled that Warren's Protest did not have to be conducted again.

The judge also rejected Warren's assertion that it was unconstitutional to require him to appeal to the AAA. Judge Conner therefore held that if Warren wanted to appeal the Board's decision, Warren "must do so before the AAA in New York City."

Judge Conner enjoined Warren from pursuing an existing California lawsuit against ASCAP and from filing any new lawsuits. The judge held that the ASCAP Consent Decree gives his court exclusive jurisdiction over the implementation of that Decree, and that Warren's lawsuits "pose 'a significant risk of frustrating'" that jurisdiction.

The judge also ruled that Warren is entitled to inspect his own ASCAP financial records (something ASCAP had permitted); but "ASCAP is not required to conduct any elaborate compilations of data at his request." Nor was Warren entitled to inspect or copy the financial records of other ASCAP members, because he failed to show "good cause" for needing to do so, as required by the Consent Decree.

Finally, Judge Conner agreed with ASCAP that it was not required to allow Warren to inspect or copy ASCAP's membership list, because he refused to commit to use the information solely in connection with ASCAP matters.

Richard Lewis Warren represented himself Pro Se. ASCAP was presented by Richard H. Reimer, and by Ross Charap, Darby & Darby, New York City.

United States v. ASCAP (Warren), 129 F.Supp.2d 327, 2001 U.S.Dist.LEXIS 898 (S.D.N.Y. 2001)[ELR 23:2:13]

Court of Appeals orders FCC to reconsider rules limiting cable subscribers and channel ownership

As Yogi Berra once said, "It ain't over till it's over." In this case, the "it" in question is the legality of federal laws that limit the number of subscribers a cable operator may reach, and limit the number of channels on a cable system that may be devoted to programming in which the cable operator has a financial interest. These federal laws of are two kinds: provisions of a statute known as the Cable Television Consumer Protection and Competition Act of 1992; and regulations adopted by the Federal Communications Commission that implement the Cable Act.

Cable television operators opposed these laws from the start, enough to seek court orders blocking their enforcement. The first case was a constitutional attack on the statute itself - an attack the cable industry lost. In Time Warner Entertainment v. United States, the Court of Appeals held that the statute is constitutional, with respect to its limits on cable subscribers and its limits on channel ownership, both (ELR 22:5:21).

The statute, however, merely directed the FCC to adopt regulations setting those limits. The statute itself did not specify what the limits should be. So, when the FCC announced the limits it decided upon, the cable industry objected again - this time successfully, at least so far.

In response to a petition for review filed by cable system operators Time Warner Entertainment and AT&T, the Court of Appeals has said that "Constitutional authority to impose some limit is not authority to impose any limit imaginable." And the appellate court has held that "the FCC has not met its burden under the First Amendment" for the limits it did set. The court also ruled that the FCC lacked statutory authority for certain of its actions, and failed to provide a "rational justification" for portions of it rules.

In an opinion by Judge Stephen Williams, the appellate court therefore reversed and remanded to the FCC both the subscriber limit and channel ownership rules, as well as certain aspects of the "attribution of ownership" rule that determines who owns cable systems and channels.

The FCC had limited the number of cable subscribers an operator could have to 30% of all cable subscribers in the nation. It limited the number of channels a cable operator could own to 40% of its system's channel capacity. In both cases, the FCC had a rationale for the limits it adopted. In neither case did that rationale satisfy the Court of Appeals.

Judge Williams reasoned that the FCC's limit on subscribers interferes with the "speech rights" of cable operators "by restricting the number of viewers to whom they can speak." And the FCC's limit on channel ownership "restricts their ability to exercise their editorial control over a portion of the content they transmit." These restrictions did not make the FCC regulations unconstitutional, automatically. But they did require the FCC to establish that they advance important governmental interests and do not burden substantially more speech than necessary to further those interests.

According to Judge Williams, one of the FCC's justifications for its subscriber limit rule did not satisfy that constitutional standard; and a second justification was beyond the authority granted to it by Congress.

The judge also concluded that the FCC's channel ownership limit burdened more speech than necessary, given the justification that had been offered for it.

Finally, Judge Williams held that the FCC had failed to provide a rational justification for certain aspects of its "attribution of ownership" rules.

Time Warner Entertainment and AT&T were represented by David W. Carpenter. The FCC was represented by James M. Carr.

Time Warner Entertainment v. Federal Communications Commission, 240 F.3d 1126, 2001 U.S.App.LEXIS 3102 (D.C. Cir. 2001)[ELR 23:2:13]

Nevada Supreme Court reverses $3.3 million judgment won by Steve Wynn in defamation suit against publishers of unauthorized biography, because jury was given inaccurate instruction on actual malice

Because one word - just one - was missing from a jury instruction on actual malice, the Nevada Supreme Court has reversed a defamation judgment of more than $3.3 million won by Steve Wynn against Lyle Stuart and Barricade Books, Inc., the publishers of Running Scared: The Life and Treacherous Times of Las Vegas Casino King Steve Wynn.

Running Scared is an unauthorized biography of Wynn written by John L. Smith. Despite the word "Treacherous" in its title, Wynn's lawsuit did not complain about anything in the book itself. Instead, it complained that an ad for the book in a trade catalog falsely described Wynn as a "front man" for organized crime. Specifically, the offending ad said the book "details why a confidential Scotland Yard report called Wynn a front man for the Genovese family."

Since Wynn is a public figure, he had to prove that the offending statement was false, and that the book's publishers made the statement with "actual malice." In Nevada, "actual malice" can be proved by showing that a publisher had doubt about the truth of a statement. But, as a result of two decisions of the Nevada Supreme Court, that doubt must be "serious"; mere "doubt" is not enough.

However, when the jury was instructed on "actual malice," it was told that liability could be imposed if a publisher "entertained doubt" about the accuracy of its statement. The jury was not told that "serious doubt" was necessary. In an unsigned Per Curiam decision, Supreme Court explained that ". . .

the omission of the critical language regarding the degree of doubt . . . effectively reduced the standard of proof required to establish malice. Because the entire case against Stuart and Barricade hinged on a finding of actual malice, the erroneous malice instruction requires reversal of the . . . judgment and remand for a second trial as to Stuart and Barricade."

From Stuart and Barricade's point of view, omission of the word "serious" was critical to its victory on appeal, because the Supreme Court rejected their alternate argument that their statement about the Scotland Yard report was protected by the "fair report privilege." Nevada law does recognize that publishers have a privilege to report "all public, official actions or proceedings." In this case, however, the Scotland Yard report had never been released to the public, nor did Scotland Yard itself ever recognize it as "official." As a result, the "fair report privilege" did not authorize

Stuart and Barricade to report its contents without liability (when, as the jury apparently found in this case, it turned out to be untrue).

On the other hand, author John Smith could not be held liable for the ad's content. The trial judge so ruled in response to Smith's pre-trial motion for summary judgment. Wynn appealed that judgment, but the Supreme Court affirmed the dismissal of Wynn's case against Smith, because Smith did not write, edit, print or distribute the offending ad.

Smith didn't escape the case completely unscathed however. Though the trial judge granted Smith's motion for summary judgment, the judge did not award Smith his attorney's fees. Smith appealed that ruling, but the Supreme Court affirmed the trial judge. The Supreme Court explained that the trial judge had not abused his discretion in denying attorney's fees in this case, because Wynn could not determine Smith's role in the publication of the offending ad "until after considerable discovery had taken place." Thus Wynn's suit against Smith was not without merit or brought in bad faith - the Nevada standard for awarding attorney's fees to successful defendants.

Wynn was represented by James J. Pisanelli and Todd L. Bice, Schreck Morris, Las Vegas; and Barry B. Langberg and Deborah Drooz, Stroock & Stroock & Lavan, Los Angeles. Smith, Stuart and Barricade Books were presented by JoNell Thomas, Las Vegas.

Wynn v. Smith, 16 P.3d 424, 2001 Nev.LEXIS 1 (Nev. 2001)[ELR 23:2:14]

Newsday photographer assumed risk of injury while taking photos of NBA playoff game at Madison Square Garden, New York Appellate Division affirms

Neither the NBA nor Madison Square Garden or the Knicks are liable for the injuries suffered by Newsday photographer Paul Bereswill, when Bereswill was hit by Charles Oakley as Oakley dove out of bounds after a loose ball during a 1994 playoff game between the Knicks and the Houston Rockets, the Appellate Division of the New Supreme Court has held.

As a result, the Appellate Division has affirmed the dismissal of Bereswill's negligence lawsuit. Bereswill lost his lawsuit because he assumed the risk of his injury by choosing to shoot photos from a spot on the floor that was just 2 to 3 feet from the playing area.

The "assumption of the risk" doctrine has long been recognized in New York law. But Bereswill argued that it shouldn't apply in his case, for three reasons: because he was neither a spectator nor a player; because he was compelled to work from the spot where he was injured; and because the NBA, Madison Square Garden and the Knicks had created "new or enhanced risks" by allowing the area to become unusually crowded with additional media personnel during the playoff series. None of these arguments persuaded the Appellate Division that Bereswill was not bound by the assumption of risk doctrine.

The court held that even non-participants are subject to the assumption of the risk defense.

It held that Bereswill had not presented evidence that he was required to shoot from the spot where he was injured.

And it held that no new or enhanced risks had been created that were not perfectly obvious to Bereswill. The photographer acknowledged that he had taken photos at 400 to 500 basketball games in the Garden; that he had seen players land among photographers at least 40 to 50 times; and that he personally had been involved in such incidents 4 or 5 times. "It is clear," the Appellate Division concluded, "that he fully comprehended the circumstances and willingly assumed the risk of continuing to work from the courtside spot in which the complained of collision eventually took place."

Bereswill was represented by James J. Tini. The NBA, Madison Square Garden and the Knicks were represented by Larry H. Lum.

Bereswill v. National Basketball Association, 719 N.Y.S.2d 231, 2001 N.Y.App.Div.LEXIS 142 (App.Div. 2001)[ELR 23:2:15]

Lease between New York Giants and New Jersey Sports & Exposition Authority did not relieve Giants of potential liability to injured fan who slipped on ice on stadium steps, though Authority itself is immune from liability, New Jersey appellate court holds

New York Giants fan Walter J. O'Connell, Jr., slipped on ice on steps inside Giant Stadium while attending a game in 1995. Now, more than five years later, O'Connell may actually get a trial on whether the Giants are liable for his injuries. To get that trial, he first had to go take his case to the Appellate Division of the New Jersey Superior Court, because a lower court had dismissed it in response to summary judgment motions filed by the Giants and the New Jersey Sports & Exposition Authority.

The Sports & Exposition Authority is the actual owner of Giants Stadium; the Giants merely lease it. Moreover, the lease appears to require the Authority to remove snow (and presumably ice) on game days, at its own expense. A lower court dismissed O'Connell's case, because it found that as a result of the lease, the Authority - rather than the Giants - owed O'Connell a duty to remove ice, and because the Authority, as a state agency, is immune from snow-removal liability under New Jersey law.

However, the Appellate Division has reversed, in part. In an opinion by Judge Erminie Conley, that court has agreed that the Sports & Exposition Authority is immune from liability. But the Appellate Division did not agree that the Giants are necessarily free from potential liability.

Judge Conley pointed out that the lease provision that makes the Authority responsible for snow removal is a provision that deals with parking areas and "exterior pedestrian walks." A separate lease provision deals with maintenance of the stadium interior; and that provision merely requires the Authority to remove "refuse and garbage," not snow or ice.

Moreover, another provision gives the Giants the right to "cure" any "default" by the Authority.

Perhaps most important of all, it is a general principle of law that tenants owe a duty of care to third parties they invite to the premises. Although a lease may allocate the duties and costs of such care between a landlord and tenant, any such allocation is binding only on the landlord and tenant. "[N]o provision of a lease can absolve a . . . tenant as against a third party from the tenant's duty to maintain the premises in a reasonably safe condition," Judge Conley said.

O'Connell was represented by Harold J. Ruvoldt, Jr., Wolf Block Schorr and Solis-Cohen, Ashbury Park. The Giants and Sports & Exposition Authority were represented by Paul J. Soderman, Zucker Facher & Zucker, Fairfield.

O'Connell v. New Jersey Sports & Exposition Authority, 766 A.2d 786, 2001 N.J.App.Div. 51 (N.J.Super.A.D. 2001)[ELR 23:2:15]

North Carolina appellate court upholds workers compensation award to football player injured during Carolina Panthers pre-season training camp, based on salary player would have been paid if he had been added to team's active roster, even though he was cut from team and did not make its active roster

Leonard Larramore played college and semi-pro football, and, over a period of years, was signed by three separate NFL teams, including the Carolina Panthers. Unfortunately, Larramore never played in the NFL. More unfortunately still, he injured his back quite badly while practicing with the Panthers during its 1995 pre-season training camp.

Larramore's injury became a matter of public legal record, because of a subsequent dispute about the amount of workers compensation benefits he should receive as a result of that injury. The North Carolina Industrial Commission awarded him benefits based on the full salary Larramore would have earned, if he had been added to the Panthers' "active roster."

Because, however, Larramore was cut from the team before its active roster was determined, the Panthers (and the team's insurance company) argued that his benefits should not have been based on that amount. Indeed, they argued that there was no evidence he was cut from the team because of his injury, rather than for "unsatisfactory" "football skills," as his NFL contract permitted.

The North Carolina Court of Appeals acknowledged that the record did not contain evidence that but for Larramore's injury he would have made the Panthers' active roster. Nevertheless, in an opinion by Judge James Fuller, a majority of the court held that the Industrial Commission was entitled to rely on circumstantial evidence that was in the record that supported an inference that Larramore's injury caused his dismissal from the team. "While this Court may disagree with the inference which the Commission drew," Judge Fuller ruled, whether Larramore would have made the active roster was "a question of fact most appropriately resolved by the Commission."

The Panthers did win a slight, partial victory on appeal. After being cut from the team, Larramore consulted his own doctor, and obtained an award from the Industrial Commission for those medical expenses. Under North Carolina law, Larramore was entitled to recover those expenses only if he requested approval for treatment by his personal doctor in a "reasonably timely fashion." The Commission, however, failed to make a finding that Larramore had made his request in a timely fashion. And so the appellate court remanded that aspect of the case to the Commission for "proper findings."

Larramore was represented by R. James Lore, Lore & McClearen, Raleigh. The Panthers and its insurance company were represented by Hatcher Kincheloe and Sharon E. Dent, Hedrick Eatman Gardner & Kincheloe, Charlotte.

Larramore v. Richardson Sports Ltd., 540 S.E.2d 768, 2000 N.C.App.LEXIS 1305 (N.C.App. 2000)[ELR 23:2:16]

Professional hockey player may be entitled to Ohio workers compensation benefits for injury suffered while playing with minor league Cincinnati Cyclones, even though he was signed by NHL Florida Panthers and had agreed to be bound by Florida law

Like many of his fellow Canadians, Jamie Linden dreamed of playing hockey in the National Hockey League; and for a short time, he did. In 1995, Linden played several games for the Florida Panthers, by whom he had been signed in 1993. But, both before and after Linden played those games for the Panthers, he played for the Cincinnati Cyclones, a minor league affiliate of the Panthers, as a result of a Panther-to-Cyclone "loan" or "assignment" that was expressly authorized by Linden's contract with the Panthers.

All of this became unfortunately relevant, because Linden was injured while playing for the Cyclones, and eventually, he applied for Ohio workers compensation benefits. The Cyclones and the Panthers opposed Linden's application on the grounds that he was not a Cyclone employee, that he had agreed to be bound by Florida workers compensation law, and that his employment was not "localized" in Ohio.

At first, the Cyclones and Panthers were successful. An Ohio trial court granted their motion for summary judgment. But on appeal, Linden has won a reversal and the right to further proceedings.

In an opinion by Judge Lee Hildebrandt, the Ohio Court of Appeals has held that under Ohio workers compensation law, the question of whether Linden was employed by the Cyclones (rather than the Panthers) depends on whether the Cyclones "controlled the manner and means of Linden's work." The answer to this question depends on material issues of fact, and thus summary judgment should not have been granted, Judge Hildebrandt concluded.

In addition, although Linden had signed an Ohio workers compensation form agreeing to be bound by Florida (rather than Ohio) workers compensation law, there was a factual dispute concerning the date on which he signed it. Thus, it is possible he signed it too late to be binding on him. And if so, the Ohio form does not conclusively establish that Linden waived his right to Ohio benefits.

Finally, the question of whether Linden's employment was "localized" in Ohio (so Ohio law should apply) depends on an evaluation of many factors. Judge Hildebrandt found there were material issues of fact that prevented this issue from being determined on summary judgment.

Linden was represented by Patrick J. Alcox, Cleveland. The Cyclones were represented by Jo Ann F. Wasil. The Panthers were represented by Jane P. Wilson, East Lake. And the Ohio Bureau of Workers' Compensation was represented by Attorney General Betty D. Montgomery and Assistant Attorney General Steven P. Fixler.

Linden v. Cincinnati Cyclones Hockey Club, 742 N.E.2d 150, 2000 OhioApp.LEXIS 2893 (Ohio App. 2000)[ELR 23:2:17]

Indiana High School Athletic Association is held in contempt for violating preliminary injunction that required it to permit student to participate in varsity basketball

Jessah Martin is a high school basketball player in the state of Indiana. Last year, she won a court order that prohibited the Indiana High School Athletic Association from "directly or indirectly" enforcing its decision that she was ineligible to play varsity basketball for Bishop Luers High School.

The reason she needed a court order is a long and quite sad story. But for present purposes, it's enough to say that Martin had transferred to Bishop Luers from another high school in the same district, and was declared ineligible to play for Bishop Luers as a result of the Association's "transfer rule." The trial court, however, found that Martin was likely to show that she satisfied the Association's own criteria for a "hardship exemption" to the Association's "transfer rule." And thus, the trial court issued a preliminary injunction that was affirmed by the Indiana Court of Appeals (ELR 22:8:22).

That should have been the end of the case, but it wasn't. In phase two, the Association was held in contempt of court, ordered to pay $500 a day in contempt "assessments," and ordered to pay Martin's attorneys fees - rulings the Court of Appeals also has affirmed, over the biting dissent of one judge.

The Association has been held in contempt, because despite the preliminary injunction that declared her eligible, Bishop Luers High School refused to allow Martin to play. The reason it refused is that in addition to the "transfer rule" that was at the heart of the case originally, the Association also has a "Restitution Rule." That rule provides that if a school permits an ineligible student to play, victories in games in which the ineligible student played will be forfeited. And the Restitution Rule applies even if the student was permitted to play as a result of a court order, if that court order is reversed on appeal. The Association appeals all injunctions, so Bishop Luers was concerned that it would have to forfeit victories if Martin's injunction were reversed.

On appeal, the Association argued that the trial court improperly held it in contempt for four reasons: because the injunction had not ordered it to waive its Restitution Rule; because Martin had not exhausted her administrative remedies; because the Association did not willfully violate the order; and because the Indiana Supreme Court had previously held the Restitution Rule to be valid, even when applied to schools that permitted students to play as a result of court orders.

In an opinion by Judge Patrick Sullivan, a majority of the Indiana Court of Appeals rejected all four of these arguments. The most significant of the four was the argument that the Indiana Supreme Court had previously upheld the Restitution Rule. And that was the argument that persuaded dissenting Judge Nancy Vaidik.

The Indiana Supreme Court cases in question were Indiana High School Athletic Association v. Carlberg and Indiana High School Athletic Association v. Reyes (ELR 20:5:21). In order to avoid the apparent impact of the Carlberg and Reyes decisions, Judge Sullivan reasoned that "While in practical terms, failing to waive the Restitution Rule meant that the [Association] was 'indirectly' attempting to enforce its decision, the trial court did not declare that the Restitution Rule was invalid. . . . Thus, the [Association's] argument that the Restitution Rule is valid has no bearing upon our determination of whether or not the [Association] was in contempt of the trial court's preliminary injunction."

Judge Sullivan also ruled that a $500 per day contempt "assessment" was an appropriate, coercive sanction. And, in a separate decision, Judge Sullivan upheld the trial court's award to Martin of $1,810 in attorneys' fees, finding that the attorney fee award did not duplicate the contempt assessment.

Judge Vaidik dissented from both decisions. In her view, the case was simply "another attack" on the Association's "unpopular" Restitution Rule. "Whether a trial court enjoins the enforcement of the restitution rule initially or allows the [Association] to purge itself of contempt by waiving the restitution rule, the result is the same - the court is ordering the [Association] to refrain from enforcing its restitution," Judge Vaidik observed. "This is in contravention of the dictates of our supreme court."

Martin was represented by Edward L. Murphy, Jr. and Stefanie R. Crawford, Miller Carson Boxberger & Murphy, Fort Wayne. The Association was represented by Robert M. Baker III, Johnson Smith Pence & Heath, Indianapolis.

Indiana High School Athletic Association v. Martin, 741 N.E.2d 757, 2000 Ind.App.LEXIS 2135 (Ind.App. 2000); *Indiana High School Athletic Association v. Martin*, 741 N.E.2d 775, 2000 Ind.App.LEXIS 2134 (Ind.App. 2000)[ELR 23:2:17]

City not liable for allowing 12-year-old boy to download sexy photos from Internet using public library computer, California appellate court affirms

The City of Livermore, California, has successfully beaten back a lawsuit by a resident identified only as "Kathleen R." who complained that her 12-year-old son Brandon used a public library computer to download sexually explicit photographs from the Internet. Ms. R's case was dismissed by California Superior Court Judge George Hernandez, Jr.; and that ruling has been upheld by the Court of Appeal, in a ruling by Justice Daniel Hanlon.

Ms. R's complaint alleged an imaginative array of causes of actions, including state law claims for waste of public funds, nuisance, and premises liability, and a federal claim for denial of substantive due process.

The complaint showed, Justice Hanlon lamented, that "A public library is in a 'damned if you do, damned if you don't' situation in deciding whether to restrict access to the Internet to prevent harm to minors." This is so, he explained, because in an earlier case, a Virginia public library was sued (and lost) for restricting access to the Internet (ELR 20:12:15), while in this case, one was sued for not doing so.

The California Court of Appeal held that "a city is not subject to suit for damages or an injunction for offering unrestricted access to the Internet through computers at a public library." Judge Hanlon explained that Ms. R's state law causes of action were preempted by federal law. And her federal substantive due process claim failed, because although the government has an interest in protecting minors from harmful materials, "it does not have a constitutional duty to do so."

Kathleen R. was represented by Michael Millen. The City of Livermore was represented by Thomas R. Curry, its City Attorney.

Kathleen R. v. City of Livermore, 104 Cal.Rptr.2d 772, 2001 Cal.App.LEXIS 158 (Cal.App. 2001)[ELR 23:2:18]

DEPARTMENTS

In the Law Reviews:

Hastings Communications and Entertainment Law Journal, Comm/Ent, has published Volume 23, Number 1 with the following articles:

Copyright Misused: The Impact of the DMCA Anti-Circumvention Measures on Fair & Innovative Markets by Jason Sheets, 23 Comm/Ent, Hastings Communications and Entertainment Law Journal 1 (2001)

NBA v. Motorola: A Legislative Proposal Favoring the Nature of Property, the Survival of Sports Leagues, and the Public Interest by Neal H. Kaplan, 23 Comm/Ent, Hastings Communications and Entertainment Law Journal 29 (2001)

State Ownership of Copyrights in Primary Law Materials by Irina Y. Dmitrieva, 23 Comm/Ent, Hastings Communications and Entertainment Law Journal 81 (2001)

Pornography and the International Internet: Internet Content Regulation in Australia and the United States by Meghan A. Wharton, 23 Comm/Ent, Hastings Communications and Entertainment Law Journal 121 (2001)

Japanese Insider Trading Law at the Advent of the Digital Age: New Challenges Raised by Internet and Communication Technology by Masanori Hayashi, 23 Comm/Ent, Hastings Communiations and Entertainment Law Journal 157 (2001)

New Technology Clauses Aren't Broad Enough: Why a New Standard of Interpretation Must Be Adopted for Internet Distribution by Lisa A. Flate, 23 Comm/Ent, Hastings Communications and Entertainment Law Journal 171 (2001)

The Federal Communications Law Journal, published by Indiana University School of Law-Bloomington, 201 South Indiana Avenue, Bloomington, Indiana 47405, has published Volume 53, Number 3 with the following articles:

A Subsidy by Any Other Name: First Amendment Implications of the Satellite Home Viewer Improvement Act of 1999, by Andrew D. Cotlar, 53 Federal Communications Law Journal 379 (2001) (for address, see above)

The Public Interest Standard: Is It Too Indeterminate to be Constitutional? By Randolph J. May, 53 Federal Communications Law Journal 427 (2001) (for address, see above)

The FCC's Main Studio Rule: Achieving Little for Localism at a Great Cost to Broadcasters by David M. Silverman & David N. Tobenkin, 53 Federal Communications Law Journal 469 (2001) (for address, see above)

The Best Laid Plans: How Unrestrained Arbitration Decisions Have Corrupted the Uniform Domain Name Dispute Resolution Policy by Ian L. Stewart, 53 Federal Communications Law Journal 509 (2001) (for address, see above)

Paved with Good Intentions: How InterLATA Data Relief Undermines the Competitive Provisions of the 1996 Act by Jean F. Walker, 53 Federal Communications Law Journal 533 (2001) (for address, see above)

Use of Public Record Databases in Newspaper and Television Newsrooms by Brooke Barnett, 53 Federal Communications Law Journal 557 (2001) (for address, see above)

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